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Justice and Consumers

Positive action in practice: some dos and don'ts in the field of EU gender equality law

Raphaële Xenidis and Hélène Masse-Dessen*

Introduction

Thirty years after the Court of Justice of the EU (CJEU)[1] grappled with the first cases, positive action remains a controversial issue of EU law. Numerous theoretical contributions have been written on the topic and the notion is by now well-known, at least from a theoretical perspective. Hence, the aim of the present article is not to propose a conceptual discussion of positive action, but rather to explore the ways in which it has been used and operationalised in practice. Based on recent legal and case law developments at EU level and in Member States, we examine the question of whether, and when, positive action truly promotes substantive equality in practice. By the same token, we look at the application of the notion through a critical lens and ask whether its misuse does not, at times, curb the principle of equality itself. After briefly defining the notion of positive action and offering some terminological clarifications (I), we briefly trace its legal development in EU law from historical landmark cases to more recent developments at the CJEU (II). In a third section, we explore and discuss the potentialities and pitfalls of positive action through examples from its different fields of application in a number of EU Member States (III). Finally, we further investigate the difficulties posed by the notion in practice through a detailed analysis of the French case law (IV). To conclude, we propose some lessons and reflections on the dos and don'ts of positive action (V).

I From formal to substantive equality?

A controversial and polysemous concept

Positive action is by now a well-known concept which has attracted the attention of a considerable amount of institutional and academic research.[2] In contrast to formal equality, which merely focuses on

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1 Throughout this article, we use the term CJEU for the sake of uniformity even though prior to 2009 the Court was in fact Court of Justice of the European Communities (CJEC).

2 See e.g. De Vos, M. (2007), *Beyond formal equality: Positive action under Directives 2000/43/EC and 2000/78/EC*, European Commission, LuxembourgLuxembourg, 2007; Selanec, G. and Senden, L. (2011), *Positive action measures to ensure full equality in practice between men and women, including on company boards*, European Commission, Brussels; Equinet (2014), *Positive action measures. The experience of equality bodies*, Brussels. See also e.g. O'Cinneide, C. (2005), 'Positive duties and gender equality', *International Journal of Discrimination and the Law*, Vol. 8, p. 91; O'Cinneide, C. (2006), 'Positive action and the limits of existing law' *Maastricht Journal of European and Comparative Law*, Vol. 13, p. 351; Fredman, S. (1998), 'After Kalanke and Marschall: Affirming affirmative action' *Cambridge Yearbook of European Legal Studies*, Vol. 1, p. 199; Fredman, S. 'Affirmative action and the European Court of Justice: A Critical Analysis' in Shaw, J. (ed) (2000), *Social law and policy in*

providing every individual or group with the same opportunities and chances, positive action aims at social transformation and *de facto* equality. It covers a broad range of measures, the objective of which is, in the short or long term, directly or indirectly, to tend towards an equality of results. By definition, positive action relates to 'differential treatment designed to ameliorate disadvantage or address specific need'.[3] Positive action measures are by essence redistributive as they seek to alter the unequal distribution of social goods of all kinds (labour, political participation opportunities, education, etc.) among different groups in society, and *in fine* the representation and inclusion of these groups. In the face of persisting inequalities and the limited capacities of an individual adversarial anti-discrimination judicial framework, positive action has been called on to provide a more systematic and upstream equality model.[4] What is more, today, measures encouraging diversity are not only regarded as a matter of equality and fairness, but also increasingly as an efficiency issue (e.g. in terms of managing human resources, producing output, etc.).[5]

To place positive action within a broader conceptual framework, it can be called a form of 'asymmetrical' equality.[6] Rather than treating comparable cases in the same manner, which is the mantra of formal equality, positive and affirmative action evolve on a spectrum ranging from real equal opportunities to substantive and transformative equality. They either seek to truly equalise chances of social participation for disadvantaged groups, or even target an equality of results termed 'substantive'.[7] At the same time, when they seek to remedy past discrimination, challenge established stereotypes and 'modify [...] social and cultural patterns of conduct' to 'eliminat[e] prejudices [...] and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes', they come under the ambit of what is now called 'transformative equality'.[8]

Despite these recognised benefits, positive action remains controversial because of its declared lack of 'neutrality'. It goes beyond the widely accepted formal equality formula of 'treating like cases as like' and speaks to the second, less-known, part of Aristotle's principle of justice by treating unlike cases differently. In lay terms, however, positive action is often assimilated to a kind of unconditional favouritism granted to certain individuals merely because of their membership of socially disadvantaged groups. This erroneous association has contributed to imbuing the notion with a controversial reputation.

an evolving European Union (1st edition), Hart Publishing); Fredman, S. (2009), *Human rights transformed: positive rights and positive duties*, Oxford University Press, Chapter 8; McCrudden, C. (1986) 'Rethinking positive action' *Industrial Law Journal*, Vol. 15, p. 219; Waddington, L. (2011), 'Exploring the boundaries of positive action under EU law: A search for conceptual clarity', *Common Market Law Review*, Vol. 48, p. 1503.

3 McColgan, A. (2014), *Discrimination, equality and the law*, Human Rights Law in Perspective, Vol. 19, Hart Publishing, p. 89. See also Barmes, L. (2009), 'Equality law and experimentation: The positive action challenge', *The Cambridge Law Journal*, Vol. 68, p. 623.

4 Fredman, *Human rights transformed positive rights and positive duties* (Chapter 8).

5 See Council of the European Union, Council recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women (1984) OJ L331/34. See also Craig, P. P. and De Búrca, G. (2015), *EU law: text, cases, and materials*, (Sixth edition), Oxford University Press, pp. 951-955.

6 McColgan, *Discrimination, equality and the law*equality and the law, pp. 70-100 and Fredman, S. (2016), 'Substantive equality revisited', *International Journal of Constitutional Law*, Vol. 14, pp. 712, 728/729.

7 For an interesting discussion of the concept of substantive equality, see for instance the debate between European and US scholars Sandra Fredman and Catharine MacKinnon: Fredman, S. (2016), 'Substantive equality revisited', *International Journal of Constitutional Law*, Vol. 14, p. 712; Fredman, S. (2016), 'Substantive equality revisited: A rejoinder to Catharine MacKinnon', *International Journal of Constitutional Law*, Vol. 14, p. 747; MacKinnon, C. A. (2016), 'Substantive equality revisited: A reply to Sandra Fredman', *International Journal of Constitutional Law*, Vol. 14, p. 739.

8 Article 5 of the Convention on the Elimination of All Forms of Discrimination Against Women, available at http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article5 accessed on 26 September 2018. See also General recommendation No. 25, on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures (2004), para. 10 available at http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf accessed on 26 September 2018. On the concept of transformative equality more specifically, see e.g. Fredman, S. (2003), 'Beyond the dichotomy of formal and substantive equality: Towards a new definition of equal rights' in Boerefijn, I. et al (eds), *Temporary special measures: accelerating de facto equality of women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women*, Intersentia; Holtmaat, R. (2012), 'Article 5' in Rudolf, B., Freeman, M. A. and Chinkin, C. M. (eds), *The UN Convention on the Elimination of all Forms of Discrimination against Women: a commentary*,Oxford University Press, pp. 143-144; Cusack, S. and Pusey, L. (2013), 'CEDAW and the rights to non-discrimination and equality', *Melbourne Journal of International Law*, Vol. 14, p. 54, p. 11-12.

A broad spectrum

At the level of terminology, concepts have frequently been mixed up, adding to the existing confusion. Even though often assimilated to 'reverse' or 'positive discrimination', positive action is legally distinguishable. While 'reverse' and 'positive' discrimination refer to direct preferences given to certain groups because of their social membership, positive action is much broader as it covers a wide spectrum of possible measures ranging from monitoring and indirect support to more direct interventions such as quotas. The existing conceptual plurality is reinforced by the different terminology used in other jurisdictions. The European notion of 'positive action' is, for instance, to be distinguished from its US counterpart. While 'affirmative action' is broadly similar, it also carries its own history and socio-legal context and functions along different parameters.[9]

As mentioned above, the term positive action embodies a wide spectrum of meanings and encompasses measures of different levels of intensity.[10] As early as 1986, Christopher McCrudden proposed a five-pronged classification of possible types of positive action: (1) the review of policies and actions in light of the discriminatory impact they can have and the eradication of discrimination – now often referred to as gender mainstreaming; (2) a form of objectively justified indirect discrimination through targeted 'inclusionary' policies aimed at increasing the representation of socially disadvantaged groups but using neutral criteria such as unemployed status or residential area; (3) 'outreach programmes' providing information, support and training to under-represented groups to increase their access to socially valued goods (e.g. jobs, political functions, study programme etc.); (4) 'preferential treatment' granting conditional or unconditional preference[11] to under-represented groups in areas such as employment, education, services, etc.; and finally (5) the redefinition of 'merit' taking into account membership of under-represented categories as an asset.[12]

In the specific context of EU gender equality law, three categories of positive action have been proposed with different purposes.[13] These aim to increase women's access to the labour market; improve work-life balance, achieve a fairer sharing of breadwinning and care responsibilities among women and men, and loosen the yoke of traditional gender roles; and finally remedy past discrimination by enhancing the representation of women in positions of power (e.g. on company boards, in political decision-making, etc.).[14]

The means of positive action are as numerous as the forms it can take. Quotas, action plans setting quantitative targets and timelines, mainstreaming of gender equality in policy- and decision-making, financial support in the form of subsidies, as well as training and non-financial support (e.g. flexible working hours, childcare facilities, etc.) are all different ways positive action can be implemented according to the European Commission.[15]

9 On this point see e.g. McColgan, *Discrimination, equality and the law*equality and the law, pp. 81-88.
10 See e.g. De Vos, *Beyond formal equality: Positive action under directives 2000/43/EC and 2000/78/EC*Marc, p. 12 and Ellis, E. and Watson, P. (2013), *EU anti-discrimination law*, Oxford University Press, p. 505.
11 Conditional preference, in contrast to unconditional access, means that the mere membership in an under-represented group does not grant automatic access to the good in question but that other criteria such as qualifications are taken into account. These concepts are further discussed in section II(1) and II(2).
12 McCrudden, 'Rethinking positive action', pp. 223-225.
13 See Craig and De Búrca, *EU law: text, cases, and materials*, pp. 950-951.
14 Ibid.
15 See European Commission, Communication from the Commission to the European Parliament and the Council on the interpretation of the judgment of the Court of Justice on 17 October 1995 in Case C-450/93, *Kalanke v Freie Hansestadt Bremen* (1996) COM(96)88 final, 9-10.

II Positive action and EU law: a tense relationship

The legal sources of positive action in EU primary and secondary law

Historically, the formal recognition of positive action in EU law started with the former Equal Treatment Directive 76/207/EEC.[16] In its Article 2(4), the directive provided the possibility for Member States to 'take measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities' in the field of employment. Despite the absence of an explicit mention of the notion of 'positive action' and the presence of the term 'equal opportunity', the case law of the Court of Justice progressively carved out today's concept. In 1984, the Commission encouraged Member States 'to adopt a positive action policy' and delineated two main aims: to eliminate 'attitudes, behaviour and structures' based on traditional gender roles and to enhance the participation of women in the labour market and their representation in positions of responsibility.[17]

In 1999, positive action made its way to primary law through an explicit mention in ex-Article 141(4) of the Amsterdam treaty (Article 157(4) TFEU) on equal pay. The terms of the debate changed slightly, with a new provision spelling out that, 'with a view to ensuring full equality in practice between men and women in working life', Member States could 'maintai[n] or adop[t] measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers'.[18]

Interestingly, the mention of equal opportunities disappeared from this new wording and was replaced by the term 'full equality in practice', while the positive and remedial nature of the measures involved was clearly spelled out. This second legal definition shifted the concept away from the ambit of formal equality and closer to the domain of substantive equality. Women are however not specifically mentioned as the recipients of positive action measures but instead the more neutral term 'underrepresented sex' was used. This is also reflected in the wording of Article 23 of the EU Charter of Fundamental Rights on equality between women and men.[19] While apparently making space for a contextual application of the legal provision, this change was criticised.[20]

Article 2(4) of the former Equal Treatment Directive has now been replaced by a dedicated provision in the Gender Recast Directive. In line with the wording of Article 157(4) TFEU, Article 3 lays down a possibility, but no obligation, for Member States to adopt positive action measures in the area of employment. Its interpretation by the Court does not diverge from its earlier interpretation of the Treaty provision. Article 5 of Directive 2010/41/EU foresees the same possibility in the field of self-employment, while Article 6 of Directive 2004/113/EC allows for positive action in the consumption and supply of goods and services. Finally, concerning discrimination on the grounds of race, sexual orientation, age, disability and religion, positive action measures are also allowed by Articles 5 and 7 of the Race Equality Directive and the Framework Directive respectively.[21]

16 Council of the European Union, Council Directive 76/207/ EC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (1976) OJ L 39/40 (hereinafter former Equal Treatment Directive).

17 Council recommendation 84/635/EEC.

18 Article 157(4) TFEU.

19 Article 23 of the Charter of Fundamental Rights provides that: 'Equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex'.

20 However, the 'Declaration (28) on Article 119(4) of the Treaty establishing the European Community' clarifies that '[w]hen adopting measures referred to in Article 119(4) of the Treaty establishing the European Community [on positive action], Member States should, in the first instance, aim at improving the situation of women in working life'. See section III(3) for a critical discussion.

21 Council of the European Union, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000) OJ L 180/22 and Council of the European Union, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (2000) OJ L 303/16.

Despite an explicit recognition, EU law specifies neither what form these measures can take nor their content. Positive action remains an option for the Member States to decide on and to design. While the inscription of equality as a founding value and an overarching objective of the Union in Articles 2 and 3(3) TEU could justify an obligation for Member States to adopt positive action measures, the principle of subsidiarity is likely to have tilted the balance in favour of more leeway for Member States to choose their equality model. As a consequence, it has been the task of the CJEU to flesh out the boundaries between lawful and unlawful positive action.

The CJEU walking the 'tightrope':[22] a progressive delimitation of the boundaries of positive action between anti-discrimination and anti-stereotyping

As early as 1986 in *Bilka-Kaufhaus*, the CJEU decided that the Treaty article on equal pay (current Article 157 TFEU) did not entail an obligation for employers to take into account and compensate *a priori* the disproportionate disadvantageous effects on women that an occupational pension scheme might have when designing its rules of operation.[23] This ruling clarified that positive action is not an obligation under EU law but rather merely an option for Member States. Two years later, the Court found in Article 2(4) of the former Equal Treatment Directive 76/207/EC a legal basis for positive action, as it 'allow[ed] measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life'.[24]

During the following decade, the CJEU refined the criteria for positive action measures to be compatible with EU law. Following infringement proceedings against France, the Court deemed, for instance, that special rights granted systematically to women by collective agreements[25] were too general to constitute positive action.[26] The Advocate General feared that the measures at stake would be discriminatory against non-beneficiaries (men) and risked perpetuating traditional gender roles, locking women into caretaking and men into breadwinning roles.[27] The French example is particularly interesting in this regard and will therefore be extensively analysed in the fourth section of this article. The take-away message was that positive action measures should be narrowly tailored and clearly and objectively aimed at redressing specific disadvantages. These criteriahave been confirmed in later cases (*Badeck*, *Abrahamsson*, *Griesmar*).[28]

The discussion of the scope of positive action focused on the issue of quotas with the landmark cases *Kalanke* and *Marschall*.[29] In *Kalanke*, a preference was given by a German regional law to female job candidates if their qualifications were equal to those of male candidates. The Court ruled that unconditional or absolute quotas were discriminatory and thus not permissible under EU law. The Commission criticised the Court's ruling and issued a communication reaffirming the need for positive action to challenge

22 Senden, L. A. J. and Visser, M. (2013), 'Balancing a tightrope: The EU Directive on improving the gender balance among non-executive directors of boards of listed companies' *European Gender Equality Law Review*.

23 C-170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] EU:C:1986:204. See also De Vos, *Beyond formal equality: Positive action under directives 2000/43/EC and 2000/78/EC*, p. 14.

24 C-312/86 *Commission of the European Communities v French Republic* [1988] EU:C:1988:485, 15 (hereinafter C-312/86 *Commission v France*; to be distinguished from a second infringement proceeding decided the same year C-318/86 *Commission v France* cited below).

25 C-312/86 *Commission v France* (1988), 8. These special rights are: longer maternity leave, shorter working hours, lower retirement age, days off when children are ill, subsidies in relation to childcare, etc.

26 C-312/86 *Commission v France* (1988), 8. See section (IV) for a detailed analysis.

27 According to A. G. Slynn, 'France's insistence on the traditional role of the mother […] ignores developments in society'. C-312/86 *Commission v France* (1988), Opinion of A. G. Slynn, EU:C:1988:428. See also Rapport d'audience présenté dans l'affaire 312/86, available at https://eur-lex.europa.eu/resource.html?uri=cellar:be18ec45-d47e-4557-9e33-cfb510c6a337.0001.06/DOC_2&format=PDF accessed on 19 September 2018.

28 C-366/99 *Joseph Griesmar v Ministre de l'Economie, des Finances et de l'Industrie and Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation* [2001] EU:C:2001:648, 87.

29 C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] EU:C:1995:322 and C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] EU:C:1997:533.

deeply entrenched inequalities.[30] The Commission also provided an interpretation of *Kalanke*, considering that the Court had only outlawed automatic quotas.[31] This was confirmed by the CJEU itself in *Marschall.* A quota scheme granting priority to equally qualified female candidates applying for a position where women are under-represented is allowed under EU law as long as the priority granted is not absolute but linked to an objective assessment of the individual situation of candidates. This assessment should allow 'reasons specific to an individual male candidate [to] tilt the balance in his favour' and the criteria able to override the priority scheme should not be discriminatory against women.[32] Following the boundaries drawn in these cases, the quotas for training and recruitment in *Badeck* were deemed flexible enough to be compatible with EU law.

In *Abrahamsson* and *Briheche,* the CJEU recognised as a 'clear aim' the achievement of 'substantive, rather than formal, equality by reducing *de facto* inequalities which may arise in society'.[33] However, lessons from these cases suggest that positive action measures should be proportionately tailored to reduce *de facto* inequalities, that is based on legitimate, clear, objective and reviewable criteria and strictly necessary to achieve their target in terms of content and duration. In *Abrahamsson*, the Court warned that granting priority to female candidates who had sufficient but not equal qualifications was going too far and was thus contrary to EU law. In the same way, in *Briheche*, a French rule that waived an age limit to sit a *concours* for entry to public-sector employment for widows who had not remarried was considered by the Court to be discriminatory against widowers who had not remarried. By contrast, following an argument made earlier in *Griesmar* (which we discuss in detail in section IV.2. below), in *Lommers* the rule governing the priority granted to female officials in access to childcare facilities was deemed proportionate if it allowed 'male officials […] who take care of their children by themselves to have access to [the] nursery places scheme on the same conditions as female officials'.[34]

The jurisprudential construction of positive action in the field of gender equality in the EU illustrates two major difficulties. The first difficulty is linked to the fine line between granting advantages to a target group and avoiding these advantages proving discriminatory against other groups. Despite the boundaries drawn by the Court through the proportionality test and the scrutiny criteria developed in the past 30 years, this line is still not always evident when operationalising the notion of positive action through law- and policy-making at national level. This difficulty is illustrated by the recent case of *Leone and Leone*, decided in 2014, which concerns the granting by France of early retirement with service credit and immediate payment of pensions to civil servants who became parents and took career breaks of two months minimum to care for each of their children.[35] Albeit neutral when taken at face value, this measure disadvantages male workers because 'many more women than men [are able to] benefit' from it and therefore indirect, as opposed to direct, sex discrimination was at stake, which could not be justified by what France presented as positive action.[36]

The second difficulty relates to finding the right balance between efforts to redress structural disadvantage by granting women substantive advantages and the risk of reinforcing existing gender stereotypes and

30 COM(96)88 final.

31 Ibid.

32 *Marschall* (1997), 24. The CJEU labelled this a 'saving clause'.

33 C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* [2000] EU:C:2000:367, 48 and C-319/03 *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice* [2004] EU:C:2004:574, 25.

34 Griesmar (2001), 56 and C-476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] EU:C:2002:183, 50 and 30 (referring to Griesmar).

35 These career breaks can take the form of maternity leave, paternity leave, adoption leave, parental leave, parental care leave or leave. See C-173/13 *Maurice Leone and Blandine Leone v Garde des Sceaux, ministre de la Justice and Caisse nationale de retraite des agents des collectivités locales* [2014] EU:C:2014:2090, 82.

36 Ibid, 45. The case is particularly interesting as the objective justification test was quite strict. The CJEU rejected France's argument that the measure constituted positive action under Article 141(4) TEC (Article 157(4) TFEU). The Court argued that such a scheme could not 'remedy for the problems which [women] may encounter in the course of their professional career, and does not […] offset the disadvantages to which the[ir] careers are exposed by helping them in their professional life and thereby ensure full equality in practice between men and women in working life'. See also ibid, 101, following the argument previously made in *Griesmar* (2001), 50, 64 and subsequently in C-46/06 *Commission of the European Communities v Italian Republic* [2008] EU:C:2008:618, 57.

perpetuating the segregation of women in caregiving roles outside the labour market.[37] *Roca Alvarez* is a good illustration of this tension between advantaging and stereotyping women.[38] This case concerned a Spanish legal provision which granted female workers who had become mothers breastfeeding leave, while it granted breastfeeding leave to male workers who had become fathers only when their partner was employed (thereby excluding the male partners of self-employed women and women who were not employed). The CJEU found that this rule was discriminatory and thus could not 'be considered [...] a measure eliminating or reducing existing inequalities in society within the meaning of Article 2(4) of Directive 76/207, nor a measure seeking to achieve substantive as opposed to formal equality by reducing the real inequalities that can arise in society and thus, in accordance with Article 157(4) TFEU, to prevent or compensate for disadvantages in the professional careers of the relevant persons'.[39] By contrast, it was 'liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties'.[40]

Recent case law development confirmed the Court's caution towards measures presented as positive action but risking perpetuating gender segregation and stereotypes. In *Maïstrellis* in 2015, the Court considered a measure preventing a male judge from taking paid parental leave if his wife is not employed unless, due to a serious illness or injury, she is unable to take care of the child.[41] The CJEU clarified that such a measure, 'far from ensuring full equality in practice between men and women in working life', reinforced traditional gender roles, overburdening women with caretaking duties.[42]

III A comparative outlook: how and where is positive action implemented at national level?[43]

All 28 EU Member States have enacted legislation on positive action.[44] The ways in which positive action has been integrated into national law however range across a broad spectrum, from binding legal obligations in a minority of EU Member States to simple voluntary measures in a majority of them. National provisions on positive action also vary with regard to their scope of application, ranging, in the majority, from limited public sector requirements to, more rarely, wide-reaching public and private obligations.

Compulsory vs optional positive action

Greece, Germany and Finland are examples of the few jurisdictions in which 'hard' positive action measures have been adopted. In Greece, positive action is 'well understood and widely applied by the courts in their jurisprudence'.[45] Article 116(2) of the Constitution provides for a general obligation for the State and

37 An interesting contribution on this topic compares the US to the EU approach to maternity leave and retirement. See Suk, J. C. (2012) 'From antidiscrimination to equality: Stereotypes and the life cycle in the United States and Europe', *American Journal of Comparative Law*, Vol. 60, p. 75.

38 C-104/09 *Pedro Manuel Roca Álvarez v Sesa Start España* ETT SA [2010] EU:C:2010:561.

39 Ibid, 38.

40 Ibid, 36 and *Lommers* (2002), 41.

41 C-222/14 *Konstantinos Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton* [2015] EU:C:2015:473, 22.

42 *Maïstrellis* (2015), 50.

43 This section is largely based on information provided by the national experts of the European network of legal experts in gender equality law. For more information, please refer to: https://www.equalitylaw.eu/. The authors of this article would also like to thank Nada Bodiroga-Vukobrat, Jean Jacqmain, Sophia Koukoulis-Spiliotopoulos, Adrijana Martinovic, Kevät Nousiainen, Panagiota Petroglou, Marlies Vegter and Nathalie Wuiame for the ad hoc expertise they provided on the issue of positive action in their respective national contexts.

44 Timmer, A. and Senden, L. (2017), *How are EU rules transposed into national law in 2017? A comparative analysis of gender equality law in Europe*, European Commission, BrusselsBrussels, 2017, p. 13.

45 We thank Sophia Koukoulis-Spiliotopoulos and Panagiota Petroglou for providing us with this information. See Koukoulis-Spiliotopoulos, S. (2003) 'Greece: From Formal to Substantive Gender Equality. The leading role of the jurisprudence and the contribution of women's NGOs' in Manganas, A. (2003) *Essays in Honour of Alice Yotopoulos-Marangopoulos*, Panteion University/Bruylant.

the public sector to adopt positive action measures to promote gender equality.[46] The material scope of this provision is much wider than EU law, as it applies to all relevant areas in which public authorities are involved.[47] In Germany, Article 3(2)(2) of the Federal Constitution establishes an obligation for public entities to further women's equality in practice.[48] This takes the form of plans seeking to increase female representation in employment, including hiring and promotion practices. However, since the effectiveness of these practices has been questioned, some *Länder* have recently adopted gender quotas following the criteria set by the CJEU.[49]

In Finland, the requirement for positive action goes even further as it applies not only to the public but also to the private sector, and notably to employers and educational institutions. Finnish public authorities have a positive duty to promote gender equality in preparatory work and decision-making and Finnish law provides for a quota of 40 % for the representation of women in non-elected decision-making bodies.[50] Sanctions are foreseen if the quota is not respected, notably the annulment of the appointment decision.[51] The same quota and rules apply to the administrative and executive boards of companies where the majority shareholder is a public entity.[52] Positive action is also required of private employers and educational institutions through equality plans.[53] Examples of measures are the monitoring and correction of the gender pay gap for private employers and the prevention of sexual harassment for educational institutions.[54] These positive action requirements are subject to enforcement by the Equality Ombudsman and the Non-Discrimination and Equality Tribunal.[55]

At the other end of the spectrum, in many EU Member States positive action is not considered a priority and therefore remains rather limited.[56] For example, positive action is generally neither required nor permitted by Latvian law save a few exceptions. Examples include *ad hoc* vocational training programmes and supportive measures for unemployed members of disadvantaged groups (e.g. parents returning from care leave, people living with disabilities, young people and older people, etc.)[57] and an obligation to 'tak[e] into account the principle of equal representation of gender' in the election of the chairpersons of the departments of the Latvian Supreme Court and of the Chief Justices of its Chambers.[58] These measures, however, do not take the form of binding provisions but, rather, are of a voluntary nature or merely represent principles to be observed without quantitative targets. No sanctions are foreseen by the law if they are not respected.[59] Apart from the Latvian example, positive action requirements mainly

46 Koukoulis-Spiliotopoulos, S. and Petroglou, P. (2018), *Country report gender equality: Greece. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union.

47 Ibid, quoting Article 19 of Act 3896/2010 transposing Directive 2006/54 and Article 5 of Act 3769/2009 transposing Directive 2004/113.

48 Lembke, U. (2018), *Country report gender equality: Germany. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union, p. 14.

49 Ibid, p. 14: e.g. North Rhine-Westphalia, Mecklenburg-West Pomerania and Lower Saxony, requiring that women are *substantially* equally qualified.

50 See Nousiainen, K. (2018) *Country report gender equality: Finland. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union, p. 13: the quota applies to 'government committees, advisory boards, working groups and other equivalent preparation, planning and decision-making bodies' as well as to 'municipal and inter-municipal co-operation bodies'. Special reasons can justify a derogation and municipal councils are excluded from the quota system. See Section 4 of the Act on Equality, available at https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/75131/Act_on%20Equality_between_women_and_men_2015_FINAL.pdf?sequence=1.

51 Nousiainen, *Country report gender equality: Finland. How are EU rules transposed into national law?*, p. 13.

52 Ibid, pp. 13-14.

53 This concerns employers with 30 or more employees. Ibid, p. 14.

54 Ibid.

55 Ibid, p. 15.

56 Timmer and Senden, *How are EU rules transposed into national law in 2017? A comparative analysis of gender equality law in Europe*, p. 13.

57 Ibid. Article 3(1) (4) of the Unemployed and Job-seekers Support Law mentions 'occupational training, retraining and raising of qualifications' as possible measures but does not give more details on the kind of positive action measures to be adopted.

58 Ibid, p. 13, quoting the Law on Judicial Power (*Likums 'Par tiesu varu'*), Official Gazette No. 1, 14 January 1993, respective amendments Official Gazette No. 160, 7 October 2005. Article 44(2) of the Law on Judicial Power and Part V (65).

59 Ibid.

take the form of soft law rather than hard law measures in a majority of countries in the EU. When they exist, binding obligations tend to concern the public sector. In general, they represent an exception in the private sector, where positive action measures may nonetheless exist on a voluntary basis. The following paragraphs provide a brief comparative overview of the issues and fields in which positive action has been implemented at the national level.

Fields of application: where and how can positive action contribute to gender equality?

This section first explores examples of positive action measures as expressly allowed under the Gender Recast Directive 2006/54/EC and Directive 2004/113/EC on goods and services. It then turns to the representation of women in positions of economic and political power, which has recently been addressed by various EU legal and policy instruments.[60]

Access to employment, promotion and pay

Several mechanisms aim to improve access for women in employment. The most well-known, but also the most controversial, are the so-called gender quotas, which attribute priority to women in relation to hiring, promotion and other employment-related matters. The categorisation proposed by Linda Senden and Goran Selanec usefully highlights the great variety of forms that quotas can take. 'Absolute' preferences grant automatic priority solely based on membership of a target group; 'strong' preferences grant priority to members of a target group who fulfil some minimum requirements; 'tie-break' preferences grant priority to members of a target group if they are equally qualified for a position or benefit; 'flexible' preferences are similar to tie-break preferences but accept that other overriding social goals modify the distribution of priority; and 'weak' preferences consider membership of a target group as one of several criteria for granting priority.[61] Only the last two forms seem to have been accepted by the CJEU so far.[62]

Several Member States have put in place employment quotas. In Germany, following the early cases of *Kalanke* and *Marschall*, discussions have focused more recently on the issue of objective and individual comparative assessments as required by the CJEU to grant preferences to female job candidates.[63] As 'there are nearly never two persons with equal qualifications, let alone a man and a woman', this quota system had been described by experts as 'ineffective' and difficult to apply.[64] North Rhine-Westphalia therefore planned to change the requirement of 'equal qualifications' to 'substantially equal qualifications' in order to smoothe the difficulties linked to such comparative assessments in relation to the gender quota system in place at regional level for recruitment in the civil service.[65] However, the State

60 Directive 2014/95/EU on disclosure of non-financial and diversity information established reporting obligations for large listed companies in relation to *inter alia* gender equality. Recommendations have been made on these reporting obligations: Communication from the Commission (2017/C215/01), Guidelines on non-financial reporting (methodology for reporting non-financial information), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0705(01) accessed on 28 September 2018. Advisory Committee on Equal Opportunities for Women and Men (2017) *Opinion on "Gender balance in decisionmaking in politics"*, available at https://ec.europa.eu/info/sites/info/files/final_version_5_december.pdf accessed on 28 September 2018.

61 See Selanec and Senden, *Positive action measures to ensure full equality in practice between men and women, including on company boards*, pp. 4-5.

62 See section II(2) of this article.

63 *Kalanke* (1995) and *Marschall* (1997).

64 Lembke, *Country report gender equality: Germany. How are EU rules transposed into national law?*, p. 15.

65 Ibid, p. 14: 'female civil servants were to be given preference in promotion under provision of substantially equal qualification, aptitude and professional performance based upon an equivalent overall evaluation in the applicant's latest assessment report, unless specific hardships occurred in the person of a male applicant, and under the further conditions of a lower proportion of female civil servants in the higher position applied for than in the corresponding lower positions and not having reached 50 % yet' and quoting the 2016 Statute on the Modernisation of the Civil Service Law.

Administrative Court of North Rhine-Westphalia rejected that amendment and the new quota system was repealed in 2017.[66]

In the Netherlands, some employers, such as the University of Delft, who were willing to increase the number of female professors, reserved a number of tenure-track positions for female academics.[67] This measure was deemed lawful by the Dutch equality body because it aimed to combat the persevering structural disadvantages suffered by women in the face of the inefficiency of numerous earlier measures taken by the University Board. Despite the Dutch equality body's approval, doubts were raised as regards the measure's permissibility under Article 157(4) TFEU and the CJEU case law following *Kalanke*.[68] Other similar measures taken around the same time, for instance an initiative by the University of Groningen to invite only female applicants for a professorship position, were considered discriminatory against men.[69]

Other examples include Austria, where 40 % female representation needs to be reached at all levels of the federal and provincial civil service.[70] The European Commission itself adopted positive action measures and indicated that it was 'well on track to meet its own target of 40 % female representation in senior and middle management positions by 2019', with a rate of about 35 % in 2017.[71]

Beyond quotas and quantitative targets, numerous other types of measures have been adopted that address the representation of women on the labour market as well as their working conditions, including pay. In Denmark, initiatives such as specific training offered to female staff are allowed for a limited period of time under the condition that the representation of one gender is 25 % or less of the whole workforce.[72] Following the Commission's recent efforts to tackle the gender pay gap,[73] the issue of pay transparency has been on the political agenda of a number of EU Member States. In Poland, positive action measures in the field of pay have translated into the creation of a free IT application which lets users calculate the pay gap in their professional sector.[74]

Positive action in the consumption and supply of goods and services

There are fewer instances of positive action in the field of the consumption and supply of goods and services. An interesting example was provided in 2017 by a textile company that launched a marketing campaign to raise awareness about the gender pay gap in Finland.[75] It reflected the average difference between women's and men's pay by selling its products at 83 % of their usual price to its female customers and announced that the benefits of the campaign would be donated to an organisation protecting women's rights.[76] The campaign was not exclusionary in the sense that all customers would have been entitled to the discount upon request, without being required to demonstrate their gender identity. However, the campaign triggered several complaints of discrimination. The Equality Ombudsman

66 See ibid, p. 15 quoting: Statute on Amendments to the Civil Service Law of North Rhine-Westphalia of 19 September 2017, available at https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument?Id=XMMGVB1729|764|765 and State Administrative Court of North Rhine-Westphalia, judgment of 21 February 2017, 6 B 1109/16. This decision pre-empted a decision of the State Constitutional Court on the topic.

67 Vegter, M. (2018), *Country report gender equality: The Netherlands. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union2018, p. 11.

68 Ibid.

69 Ibid.

70 Thomasberger, M. (2018), *Country report gender equality: Austria. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union, p. 12: Paragraph 8 of the Equal Treatment Act (Private Sector) and Paragraphs 11 to 11d of the Federal Equal Treatment Act for Civil Servants.

71 European Commission, *International Women's Day 2017: Gender equality – a European export* (8 March 2017) available at http://europa.eu/rapid/press-release_IP-17-489_en.htm accessed on 20 September 2018.

72 Jørgensen, S. (2018), *Country report gender equality: Denmark. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union2018, p. 12.

73 European Commission, *EU Action Plan 2017-2019 Tackling the gender pay gap COM(2017)678* (2017).

74 See Zielińska, E. (2018), *Country report gender equality: Poland. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union2018, pp. 13-14.

75 See Nousiainen, *Country report gender equality: Finland. How are EU rules transposed into national law?*

76 Ibid.

in fine concluded that it was not discriminatory as long as all customers had clearly been informed that they were *de facto* entitled to the discount.[77] This is an interesting example which could pose new questions in relation to EU law in the future. The initiative of the Finnish company can surely be regarded as a case of overstretching the concept of positive action. At the same time, it can also be considered to be a thought-provoking, symbolic initiative. While this measure can *de facto* do little to improve full equality in practice, it does increase the visibility of, and public awareness about, the problem of the gender pay gap.

On 8 March 2018, the Lithuanian equality body launched a campaign against gender-based pricing called 'Price Has No Gender'.[78] The Lithuanian Ombudsperson deemed the decision of a car-washing company to offer discounts to female customers only in order to demonstrate the user-friendliness of a new service discriminatory.[79] This example demonstrates how 'positive action' risks being misinterpreted, misappropriated and misused as a pretext to implement measures that actually reinforce existing harmful gender stereotypes. Typically, the initiative described above is based on a traditional representation of segregated gender roles, with activities related to cars viewed as 'masculine', which affects collective representations of women's capabilities and can have demeaning effects on gender equality (e.g. the argument that a traditionally masculine service has become 'easy-to-use' so women can now use it).[80]

Positive action measures aimed at improving the gender balance on company boards

The equal representation of women on company boards has been an important topic on the EU agenda for many years now.[81] In 2012, the Commission proposed a directive which aimed to improve the gender balance on non-executive company boards.[82] The initial plan was to set a quantitative objective of 40 % for the proportion of each gender on company boards to be reached by 2020 for the private sector and by 2018 for the public sector. However, while a broad consensus exists on the necessity of improving the representation of women in this area and many Member States have adopted measures to this end, the directive proposal has now been blocked in the Council for years. Member States mainly disagree about the transformation of positive action into a binding EU obligation and remain in favour of more subsidiarity.[83]

At the national level, some Member States, such as Belgium, France, Italy, Germany and more recently Portugal and Austria, have adopted hard legal measures such as mandatory quotas along with sanctions in case of non-respect, in order to improve the gender balance at the level of company management.[84]

77 Ibid, quoting the Equality Ombudsman's opinion of 29.08.2017, Dnro TAS/225/2017.

78 See Davulis, T. (2018) *The Office of the Equal Opportunities' Ombudsperson in Lithuania started campaign against possible discriminatory pricing of services for women and men*, European Network of legal experts in gender equality and non-discrimination; European Union, 24 July 2018, available at https://www.equalitylaw.eu/downloads/4651-lithuania-the-office-of-of-the-equal-opportunities-ombudsperson-in-lithuania-started-campaign-against-possible-discriminatory-pricing-of-services-for-women-and-men-pdf-138-kb accessed on 28 September 2018.

79 Ibid.

80 The subsequent pilot study launched by the Ombudsperson also revealed discriminatory 'gender pricing' based on gender stereotypes in beauty services such as hairdressing, manicuring, etc. While hairdressing is tendentially more expensive for women, a manicure or a pedicure is more expensive for men. See ibid.

81 See e.g. Selanec and Senden, *Positive action measures to ensure full equality in practice between men and women, including on company boards* and Oliveira, Á. and Gondek, M. (2014), 'Women on Company Boards – An Example of Positive Action in Europe' *EUI Working Papers* 2014/34, Robert Schuman Centre for Advanced Studies.

82 European Commission, Proposal of 14 November 2012 for a Directive of the European Parliament and of the Council on improving the gender balance among nonexecutive directors of companies listed on stock exchanges and related measures (2012) COM (2012) 614 final.

83 Council of the European Union, Progress Report of 31 May 2017 on the Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among directors of companies listed on stock exchanges and related measures (2017) 2012/0299 (COD), 2, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9496_2017_INIT&from=EN accessed on 19 September 2018.

84 Senden, L. and Kruisinga, S. (2018), *Gender-balanced company boards in Europe: A comparative analysis of the regulatory, policy and enforcement approaches in the EU and EEA Member States*, European Network of legal experts in gender equality and non-discrimination; European Union, available at https://www.equalitylaw.eu/downloads/4537-gender-balanced-company-boards-in-europe-pdf-1-68-mb accessed on 20 September 2018, p. 52. See also van Hoof, F. (2018), 'Key

These measures generally apply to all state-owned companies and to private companies of a certain size, often those listed on the stock exchange. In Austria for example, legislative developments that entered into force in January 2018 now require companies listed on the stock exchange with 1 000 employees or more to apply a 30 % quota to improve the gender balance on any supervisory board that has six or more members. Breaching this rule is sanctioned by an empty seat policy.[85]

In Estonia, Finland, Greece and Slovenia, binding legislation has been adopted with a view to this but exclusively in relation to state-owned companies.[86] Other Member States have adopted a soft regulatory approach applying either to the private sector or both public and private companies, such as Bulgaria, Denmark, Finland, the Netherlands, Romania and Spain.[87] For instance, the Netherlands has adopted a comply-or-explain mechanism according to which companies must meet a 30 % target for the representation of each gender on company boards. Renewed in 2017, this soft legal mechanism foresees that if the target is not reached, companies have to explain the reasons for failure and the measures put in place in order to remedy the gender imbalance.[88] However, research shows that the efficiency of such a mechanism is minimal in the Dutch context.[89] Spanish law foresees a similar mechanism but without setting any quantitative target.[90]

In contrast, in 2017 Croatia, Cyprus, the Czech Republic, Greece, Hungary, Latvia, Lithuania, Malta and Slovakia had no legal provisions aiming to increase the representation of women on company boards.[91] However, Croatia, the Czech Republic, Malta and Slovakia do have policy measures in place in this regard.[92] Examples of recent policy measures in Malta include a monitoring programme aimed at advancing the careers of women in economic decision-making, along with a directory of professional women 'giving visibility and more opportunities to professional and competent women for appointment on boards and committees'.[93] A diversity charter was adopted in May 2017 in Slovakia, which aims to support diversity and inclusion in the workplace through several channels such as awareness-raising initiatives, training, mainstreaming diversity in human resources, decision-making, etc.[94] In Croatia, these policy measures

developments at national level in legislation, case law and policy', *European Equality Law Review*, Vol. 1, pp. 60 and 107 available at https://www.equalitylaw.eu/downloads/4639-european-equality-law-review-1-2018-pdf-1-086-kb accessed on 28 September 2018; Thomasberger, M. (2017), *Austria enacts legislation for a 30 % quota of women on supervisory company boards*, European Network of legal experts in gender equality law; European Union, 23 November 2017, available at https://www.equalitylaw.eu/downloads/4510-austria-austria-enacts-legislation-for-a-30-quota-of-women-on-supervisory-company-boards-pdf-168-kb accessed on 28 September 2018; Palma Ramalho, M. do R. (2017), *Recent developments in Portuguese employment law regarding women on company boards,* European Network of legal experts in gender equality law; European Union, 23 November 2017, available at https://www.equalitylaw.eu/downloads/4512-portugal-recent-developments-in-portuguese-employment-law-regarding-women-on-company-boards-pdf-120-kb accessed on 28 September 2018.

85 Thomasberger, *Country report gender equality: Austria. How are EU rules transposed into national law?*, p. 13. This rule does not apply to companies whose workforce is composed of less than 20 % of employees of one sex.

86 Senden and Kruisinga, *Gender-balanced company boards in Europe: A comparative analysis of the regulatory, policy and enforcement approaches in the EU and EEA Member States*policy and enforcement approaches in the EU and EEA Member States, p. 47.

87 Ibid.

88 Vegter, *Country report gender equality: The Netherlands. How are EU rules transposed into national law?*, p. 12.

89 Ibid, p. 12, quoting Letter to Parliament, 6 March 2018, ref. 1327715.

90 Ballester Pastor, M. A. (2018), *Country report gender equality: Spain. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union, p. 11.

91 Senden and Kruisinga, *Gender-balanced company boards in Europe: A comparative analysis of the regulatory, policy and enforcement approaches in the EU and EEA Member States*policy and enforcement approaches in the EU and EEA Member States, p. 46.

92 Ibid, p. 59.

93 Both initiatives were launched in 2015 with the support of the European Union. See ibid, p. 58 and National Commission for the Promotion of Equality, 'Gender balance in decision-making' (2016), available at https://ncpe.gov.mt/en/Pages/Projects_and_Specific_Initiatives/Gender_Balance_in_Decision_Making.aspx accessed on 28 September 2018.

94 Magurová, Z. (2018), *Country report gender equality: Slovakia. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union, p. 15, and Pontis, N. 'Charta Diverzity' (2017), available at https://www.chartadiverzity.sk/charta-diverzity-sr/english-summary/ accessed on 28 September 2018.

took the form of a public campaign including the launch of a special website, awareness-raising through the media and educational seminars promoting gender equality on company boards.[95]

Political representation and elected functions

The representation of women in positions of political power is as important for gender equality as their presence in the economic sector. Some Member States such as Belgium, France and Slovenia have imposed diverse forms of quotas to improve gender equality in political elections. In Belgium, for instance, a quota system ensures the parity of electoral lists at all levels of the State (federal, regional and local) – a measure described as 'highly effective'.[96] In Slovenia, a gender quota of 40 % was introduced in the early 2000s for local elections and elections to the European Parliament, and in 2006 a gender quota of 35 % was introduced for national parliamentary elections. Electoral lists proposed by political parties can be rejected in case of non-respect.[97] In France, the law on departmental elections was reformed in 2013 to introduce a binominal system by which voters no longer choose one candidate but a team composed of a man and a woman.[98]

In Germany, the State Constitutional Court of Mecklenburg-West Pomerania, later imitated by the State Labour Court of Schleswig-Holstein, confirmed the validity of a provision of the regional equal treatment legislation which, in the public sector, reserved the right to run and vote for the position of equal opportunities commissioner to female employees only.[99] Arguing that women are the victims of structural discrimination, the Court explained that the law constituted a positive action measure meant to compensate for the disadvantages generally suffered by women in their working life, e.g. the difficulties of reconciling work and family life, sexual harassment in the workplace, their under-representation in leading positions, etc. Thus it departed from a formal equality approach, stating that special measures are essential to achieve substantive equality.[100]

By contrast, in Sweden, where the representation of women in both the Parliament and the Government amounts to almost 50 %, no gender quotas were used. This relative gender balance was achieved thanks to a voluntary practice among political parties which, motivated by public expectations, appoint a woman as every second candidate for political elections.[101] Finally, other types of positive action measures include training, awareness-raising campaigns, capacity-building, mentoring and networking programmes to encourage women to enter politics. Such policies are in place, for instance, in Slovenia through the project 'Meta Dekleta – Promotion of active citizenship of young women' and Ireland with the platform 'Women for election'.[102]

95 Nacsa, B. (2018), *Country report gender equality: Hungary. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union, pp. 13-14.

96 Article 11*bis* of the Constitution quoted in Jacqmain, J. (2018) *Country report gender equality: Belgium. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union, p. 14, and European Commission, *2018 report on equality between women and men in the EU*, Publications Office of the European Union, p. 29.

97 European Commission, *2018 report on equality between women and men in the EU*.

98 Ibid.

99 See Lembke, *Country report gender equality: Germany. How are EU rules transposed into national law?*, p. 15, citing State Constitutional Court of Mecklenburg-West Pomerania, judgment of 10 October 2017, LVerfG 7/16 and State Labour Court of Schleswig-Holstein, judgment of 2 November 2017, 2 Sa 262 d/17. The measure applied to all bodies where such an equal opportunities commissioner had to be elected, i.e. in employee councils, councils of judges and public prosecutors' councils in all regional public institutions (state schools, public administration, courts, etc.). The task of the equal opportunities commissioner is to promote gender equality in these bodies.

100 Ibid, p. 15.

101 Julén Votinius, J. (2018), *Country report gender equality: Sweden. How are EU rules transposed into national law?*, European network of legal experts in gender equality and non-discrimination; European Union, p. 13.

102 Commission, *2018 report on equality between women and men in the EU*, p. 30. Meta Dekleta – Promotion of Active citizenship of young women, available at https://eeagrants.org/project-portal/project/SI03-0014 accessed on 28 September 2018, and Women for Election, available at http://www.womenforelection.ie/ accessed on 28 September 2018.

Difficulties

Many difficulties exist with regard to the implementation of positive action at the national level. Firstly, it can prove arduous to draw general rules of application from the boundaries established by the CJEU between lawful and unlawful positive action, let alone to transpose these rules into concrete policy-making. In fact, it has been deplored that the complexity and restrictiveness of the rules deployed by the CJEU in its successive case law in effect hinder positive action.[103] In Germany, the difficulties exposed above in relation to the comparative assessment of equal qualifications for male and female job candidates were also signalled as a recurring obstacle to the effectiveness of positive action.[104] In Sweden, experts highlight increasing uncertainties about the scope and meaning of positive action following the CJEU's invalidating decision in the *Abrahamsson* case.[105] Furthermore, the very definition of individual merit, which is used in EU law and beyond as a yardstick to articulate the limits of positive action,[106] is highly indeterminate and therefore makes designing lawful positive action measures challenging.[107]

Secondly, the indeterminacy and vagueness of the set of recommendations and measures often contained in action plans and strategic documents might also hinder the effective implementation of concrete positive action measures.

The question of the beneficiaries of positive action is also challenging. While some national legislation, such as the Dutch law for instance, explicitly refers to women, EU law remains neutral and speaks of the 'under-represented sex'. The use of this neutral formulation was criticised, as men are often not a disadvantaged group even when they are under-represented.[108]

A further challenge is the enforcement of positive action. In fact, the merely declaratory nature of positive action measures, the lack of precise targets and objectives and the absence of dissuasive sanctions and appropriate remedies in case of breaches have repeatedly been signalled as obstacles to their proper implementation.[109] In Finland, for instance, the enforcement of legislation is not monitored effectively and sanctions for non-implementation are often not consistently implemented.[110] In Belgium, the Gender Act in principle allows positive action, which is considered a lawful justification for differential treatment, but is in fact still awaiting implementation through a Royal Decree that has not yet been adopted, leaving positive action in a grey zone.[111] Enforcement should also address the differences in gender representation across the hierarchical spectrum within given sectors. In Croatia for instance, it would not be enough to consider the average representation of women among judges, as it ranges from 72 % in municipal courts to 23 % at the Constitutional Court.[112]

Finally, positive action can prove a double-edged sword, as its positive effects on gender equality risk being offset by the resentment, misunderstandings and controversies it often provokes. In a number of EU Member States, including Germany, Belgium, Croatia and the Netherlands, experts express concerns

103 Vegter, *Country report gender equality: The Netherlands. How are EU rules transposed into national law?*, p. 11 and Timmer and Senden, *How are EU rules transposed into national law in 2017? A comparative analysis of gender equality law in Europe*.
104 Lembke, *Country report gender equality: Germany. How are EU rules transposed into national law?*, p. 14.
105 Julén Votinius, *Country report gender equality: Sweden. How are EU rules transposed into national law?*, p. 12.
106 See section II(2) of this article.
107 See McCrudden, 'Rethinking positive action', p. 225.
108 See, for instance, what Bourdieu calls the 'double standard': 'As is seen in the difference between the chef and the cook, the couturier and the seamstress, a reputedly female task only has to be taken over by a man and performed outside the private sphere in order for it to be thereby ennobled and transfigured'. Bourdieu, P. (2001), *Masculine domination*, Stanford University Press, p. 60.
109 We would like to thank Nada Bodiroga-Vukobrat, Adrijana Martinovic, Kevät Nousiainen and Marlies Vegter for highlighting this.
110 See Nousiainen, *Country report gender equality: Finland. How are EU rules transposed into national law?*, p. 15.
111 Jacqmain, J., *Country report gender equality: Belgium. How are EU rules transposed into national law?,* p. 13.
112 We thank Nada Bodiroga-Vukobrat and Adrijana Martinovic for highlighting this data. See Edina Aranjoš Borovac (2018), *Women and Men in Croatia, 2018*, p. 58, p. 56 available at https://www.dzs.hr/Hrv_Eng/menandwomen/men_and_women_2018.pdf accessed on 11 October 2018.

over 'fundamental misunderstandings', 'under-development','clumsy usages' and 'resistance' in relation to the purpose and content of positive action measures.[113] Positive action is a popular ground for political hijacking by populist and conservative parties in some Member States, such as Germany, where it has also been increasingly contested in courts.[114] Stigmatisation of what are pejoratively called 'quota women' or quota groups is also alarming, as beneficiaries of positive action risk being victimised and their skills and qualifications denigrated, therefore defeating the very purpose of positive action.[115] At the level of political debates, for instance in the Netherlands, the misunderstandings surrounding positive action have led to resistance and frustration from majority groups who see themselves as disadvantaged, but also from minority groups themselves, who do not want to be categorized as the beneficiaries of quotas or preferences.[116]

While this section has given concrete examples of the enforcement of positive action at the level of EU Member States and has analysed some of its legal, social and political consequences, the next section delves in detail into the legal articulation of the concept and the difficulties of its deployment. To this end, the analysis focuses on the French example – France having played a historical role in the development of the concept of positive action through its judicial dialogue with the CJEU.

IV The limitations and difficulties of positive action: the example of the French context

The difficulties and limitations of positive action are well illustrated by the arduous process of its integration into the French legal system.

French constitutional tradition

It is well known that French law is defined by its generality and is fundamentally imbued with the principle of equality, which is different from the principle of non-discrimination.[117] Article 1 of the Declaration of Human and Civic Rights of 1789, which still forms part of positive law in France, states that '[m]en are born and remain free and equal in rights' and that the law 'must be the same for all, whether it protects or punishes'. It further provides that '[a]ll citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.'[118] Article 1 of the Constitution, which remained unchanged until 2008, maintains this principle: 'France shall be an indivisible, secular, democratic and social Republic. It

113 A notable exception to this is the case of Greece, where experts Sophia Koukoulis-Spiliotopoulos and Panagiota Petroglou find positive action to be generally well understood and widely applied. A further exception in relation to Finland is worth mentioning. Kevät Nousiainen finds that positive action is positively regarded by social partners as a less confrontational method to combat discrimination. Regarding Belgium, Jean Jacqmain and Nathalie Wuiame point out an interesting example in the civil service of the Brussels Capital Region, where an assessment for promotion found a male and a female candidate of equal merit and the female candidate was promoted, the Government arguing positive action in favour of women. The male applicant challenged this decision and the Conseil d'Etat (highest administrative court) annulled the decision, arguing that it lacked the formal motivation required by the Act of 29 July 1991, as the Government did not demonstrate that women were under-represented in that particular professional category (*Khassime*, 6 October 2015, n°232.451). See Lembke, *Country report gender equality: Germany. How are EU rules transposed into national law?*, p. 15. We would also like to thank the national experts of the countries mentioned for providing their views on the development of positive action in their national context.

114 Ibid, p. 15.

115 Ibid. We would like to thank Kevät Nousiainen for drawing our attention to the term 'quota women' in relation to the Finnish debate on positive action.

116 We would like to thank the Dutch expert, Marlies Vegter, for drawing our attention to these counter-reactions.

117 Equality means that persons in the same or a similar situation must be treated equally. A comparison is required to establish differential treatment, and the cause of this unequal treatment does not matter. By contrast, non-discrimination means that no decision impacting a person can be taken if motivated by a prohibited criterion. A comparison may be useful to establish discrimination but is not always necessary, and the prohibited criterion must be shown.

118 Déclaration des Droits de l'Homme [Declaration of Human and Civic Rights] (1789), Articles 1 and 6.

shall ensure the equality of all citizens before the law, without distinction of origin, race or religion'.[119] The preamble to the Constitution of 1946, which also forms part of positive law, specifies that, '[t]he law guarantees women equal rights to those of men in all spheres'.

However, not all men, and *a fortiori* not all women, were included in this conception of equality. Women and colonised peoples, who had special status, did not have equal rights. It was not until 1936 that the Conseil d'État (Council of State) granted women access to civil service posts without distinction except for operational reasons.[120] Nevertheless, these 'operational' reasons long continued to be closely linked to stereotypes and prejudices.[121] It was only with the Order of 21 April 1944 that women obtained the right to vote and not until the Law of 13 July 1965 that some equality was recognised in matrimonial regimes, although the preamble to the Constitution of 1946, which is still part of positive law, already specified that '[t]he law guarantees women equal rights to those of men in all spheres'.[122] In short, the much vaunted doctrine of equality was not without major flaws.

Furthermore, it never prevented the introduction of numerous specific measures far beyond the historical purview of maternity protection. These included differences in the minimum age for access to employment and in the retirement age, exclusion from certain roles and from night work, specific rights to rest, jobs restricted to people of one sex or the other, separate schools and qualification systems – without these measures apparently being considered violations of the constitutional principle of equality. Some of the measures were associated with protecting women's reproductive function, but many were related to so-called 'issues of decency' and thus to stereotypes based on women's supposed weakness. Incidentally, these restrictions were sometimes the result of demands made by men's trade unions.[123]

Upholding equal rights: three French cases before the Court of Justice

It is only latterly, in the second half of the 20th century, that the principles of equality and non-discrimination have enabled these measures to be challenged. In the first instance they were judged harshly. Except in cases where belonging to a particular sex is an essential condition for an activity (such as performing artists), they were gradually abolished or declared unlawful. There was no reflection – or very little – on the 'positive' aspect of the measures. The sole aim was formal equality. Gradually, the most obvious barriers disappeared – in law if not in reality – especially in relation to access to occupations. However, it is not easy to repeal protective measures without creating new inequalities. It is also interesting to examine the arguments of those who defended the measures, including some trade unions seeking to protect their beneficiaries from greater vulnerability.

A number of emblematic cases warrant attention. In terms of specific protective measures in collective agreements, the clauses establishing them, which clearly derogate from equality, were regulated but continued to be authorised by the law of 16 July 1983 on the rights and obligations of civil servants:[124] 'Any term reserving the benefit of any measure to employees on grounds of sex included in any collective labour agreement or labour contract shall be void, except where such a clause is intended to implement the provisions of Articles L. 122-25 to L. 122-27, L. 122-32 and L. 224-1 to L. 224-5 of this code' (relating to protection of pregnancy and maternity).

119 The planned consitutional reforms, the discussion of which is currently postponed, removes 'race' and inserts 'sex' into this article.

120 CE, 3 juillet 1936, Dlle Bobard [Council of State, 3 July 1936, Miss Bobard].

121 Roman, D. (2018), 'La promotion des femmes par la jurisprudence administrative in Actes du colloque « la juridiction administrative et les femmes »' ['The promotion of women through administrative case law, in conference proceedings, "Administrative jurisdiction and women"'], *AJFP*, p. 2215.

122 Ordonnance du 21 avril 1944 portant organisation des pouvoirs publics en France après la Libération [Order of 21 April 1944 organising public authorities after the Liberation of France], Art. 17 and Loi portant réforme des régimes matrimoniaux, 13 juillet 1965, n° 65-570 [Law reforming matrimonial systems, 13 July 1965, n° 65-570].

123 Perrot, M. (1998), Les femmes ou les silences de l'Histoire [Women or the silences of history], Paris, Flammarion.

124 Loi dite 'Loi Le Pors' portant droits et obligations des fonctionnaires, 13 juillet 1983, n° 83-634 [Law on the rights and obligations of civil servants, 13 July 1983, n° 83-634].

In 1988, France was referred to the CJEU because of the 'special benefits' accorded to women in collective agreements.[125] For the French Government, the so-called 'special benefits' provision[126] should be *'considered compatible with the principle of equality when those special rights derive from a concern for protection. The French Government consider[ed] that the directive should be interpreted in the same manner, and that such an approach [wa]s supported by the provisions of Article 2 (3) and (4) [on specific protection for women, pregnancy and maternity and on positive action], of the directive. The French Government further consider[ed] that neither the directive nor the principle of equal treatment for men and women [wa]s intended to modify the organization of the family or the responsibilities actually assumed by the marriage partners. It claim[ed] that the special rights for women provided for in collective agreements [we]re designed to take account of the situation existing in the majority of French households. Member States, moreover, have a degree of discretion in that regard when implementing the directive'*.[127]

In other words, according to France, the 'special benefits' at stake were compensation measures to take account of women's *de facto* different social situation. No mention was made of any need to change this situation, the focus was purely on compensating for the consequences. Thus, 'positive action' was not invoked as such, the French reasoning merely defended the existence of a compensation measure deemed admissible because, France argued, the aim of the directive was not to transform gender relations in work and family life. This analysis was firmly rejected by the Court.[128] The Court stated that, generally, there can be no derogations from the principle of equality under the guise of 'removing existing inequalities'. Thereby it already made a distinction between compensation and positive action and, consequently, rejected the French position advocating general compensation measures. France's reaction was not to abolish all special measures, but to restrict the scope by regulating collective negotiation.

It is also interesting to look at another 'French' case from 1988.[129] Traditionally, separate *concours* (recruitment competitions) were held for candidates seeking entry to different sections of the civil service.[130] Thus, among others, there were different competitions for police officers and teachers. The justification given for this is interesting: for some sections (the police and prison officers) the contingencies of the role meant that it had to be restricted to a single sex. With regard to primary school teachers and physical education teachers, the French Government highlighted the need to give children the opportunity to be educated by men as well as women, since the profession was very female-dominated and the joint competitions were not enabling enough men to be recruited. The French Council of State approved this measure,[131] holding that restricting women's access in this way was justified, 'taking into account the mission of the civil service in relation to pre-school and primary education and the potential

125 C-312/86 *Commission v France* (1988).

126 Ibid, 8. The judgment of the CJEU specifies that, 'According to the Commission, which has not been contradicted on this point by the French Government, special rights for women included in collective agreements relate in particular to: the extension of maternity leave; the shortening of working hours, for example for women over 59 years of age; the advancement of the retirement age; the obtaining of leave when a child is ill; the granting of additional days of annual leave in respect of each child; the granting of one day's leave at the beginning of the school year; the granting of time off work on Mother's Day; daily breaks for women working on keyboard equipment or employed as typists or switchboard operators; the granting of extra points for pension rights in respect of the second and subsequent children; and the payment of an allowance to mothers who have to meet the cost of nurseries or childminders'.

127 Ibid, 10-11.

128 Ibid. 'It must be borne in mind that the principle of equal treatment which is to be implemented, under Article 5(2)(b) of the directive, with regard to collective labour agreements means, in the words of Article 2(1) of the directive, that "there shall be no discrimination whatsoever on grounds of sex". Article 2(3) and (4) provides that the directive is to be without prejudice either to provisions concerning the protection of women, particularly as regards pregnancy and maternity, or to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in the directive. It must be concluded, both from the generality of the terms used in the French legislation, which allows any clause providing "special rights for women" to remain in force, and from the examples of such special rights which have been cited in the pleadings, that the contested provisions cannot find justification in Article 2(3). As some of those examples show, some of the special rights preserved relate to the protection of women in their capacity as older workers or parents – categories to which both men and women may equally belong.'

129 C-318/86 *Commission of the European Communities v French Republic* [1988] EU:C:1988:352.

130 Within the civil service there are different sections or 'corps' of employees linked to a particular profession or field. For example: primary teachers or police officers.

131 CE, 16 avril 1986, n° 47337 [Council of State, 16 April 1986, n° 47337].

psychological benefit for children in this age group of having a teaching body composed of men and women'. The Commission did not share this analysis and referred France to the CJEU.[132] During the course of the proceedings, teachers had been withdrawn from the list of civil service corps with separate *concours*, which left the police, prison administration and a very specific teaching corps.[133] Irrespective of the solution adopted by the Court judgment, which relates to the remaining corps, it is notable that the French Government's argument already raised the issue of the beneficiaries of positive action. It was not an audible argument at the time, but we cannot be sure that it would still be the case today, as we shall see.

The third well-known French case is the *Griesmar* case[134] which relates to increases to insurance duration for civil servants' pensions. The legislation on retirement pensions for civil servants, considered similar to a payment under Article 119 of the EC Treaty then applicable, limited *to female civil servants who have had children a service credit for the calculation of their retirement pension. Their pension was credited not because of a loss of entitlements resulting from maternity leave but because they had brought up children. Thus this measure excluded male civil servants from benefiting from this credit even if they had been responsible for their children's upbringing.* Here, again, the French Government defended the measure as a compensation measure, due to the incontestable fact that women's careers entitle them to much lower pensions than men. Once again, the measure was too general to be justified.

The Court noted that '[t]he measure in question [wa]s limited to granting female civil servants who are mothers a service credit at the date of their retirement, without providing a remedy for the problems which they may encounter in the course of their professional career.' Following this judgment, fathers also obtained the service credit but, given the cost of this measure, a reform was deemed necessary. However, this reform, while it removed the increases, significantly penalised women who had, in fact, seen their careers curtailed. In terms of pensions, the issue was not about entitlements which could be exercised immediately but entitlements built up over a long period, meaning that a simple alignment could produce serious inequalities.[135] Law 2004-1485 of 30 December 2004 preserved the automatic nature of the benefit for women, while men would have to provide proof of their involvement in caring for their children.[136] The Leone judgment subsequently rejected this position, noting that '[u]nless it can be justified by objective factors unrelated to any discrimination on grounds of sex, such as a legitimate social policy aim, and is appropriate to achieve that aim and necessary in order to do so, which requires that it genuinely reflect a concern to attain that aim and be pursued in a consistent and systematic manner in the light thereof, a service credit scheme for pension purposes such as the one at issue in the main proceedings gives rise to indirect discrimination in terms of pay as between female workers and male workers'.[137]

Following this, in a judgment by the Assembly of 27 March 2015,[138] the Conseil d'Etat considered that proof of the existence of a legitimate motive had been provided and approved the law reforming the pension system, noting furthermore that it had been amended again to remove the benefit for the future.[139] This marked the end of this long-running dispute.

132 C-318/86 *Commission v France* (1988).
133 Ibid.
134 *Griesmar* (2001).
135 Masse-Dessen, H. « Retraite des femmes: existe-t-il des marges de manœuvre du point de vue du droit communautaire sur la reconnaissance de droits particuliers? Interrogations et espoirs » ['Women in retirement: is there room to maneouvre on the recognition of special rights from the point of view of Community law? Concerns and hopes'], *Revue française des affaires sociales* 2012/4, pp. 207-213, available at https://www.cairn.info/revue-francaise-des-affaires-sociales-2012-4-page-207.htm accessed 20 September 2018.
136 Loi de finances rectificative pour 2004, 30 décembre 2004, n° 2004-1485 [Corrective financial law for 2004, 30 December 2004, n° 2004-1485].
137 Leone and Leone (2014).
138 CE Ass., 27 mars 2015, *M. Quintanel*, n° 372426 [Council of State Assembly, 27 March 2015, no. 372426].
139 Loi portant réforme des retraites, 9 novembre 2010, n° 2010-1330 [Law reforming the pension system, 9 November 2010, n° 2010-1330].

Introducing positive action into French law

This is the landscape in which the debate on positive action is taking place in France. On the domestic level, it is conceived as a derogation and intrinsically suspect. But designed as a compensation measure it is also essentially a social justice measure. Where does the balance lie? Is it possible to answer this question without defining positive action more specifically? We will consider a number of examples.

Firstly, since 1988 and with subsequent laws, the debate on 'special measures' has changed. It is now accepted that strict equality does not lead to justice and that voluntary, and therefore positive, action is required. Thus, the law has progressively established requirements in the private sector regarding the collection and publication of information about the state of equality between women and men, and regarding the negotiation and development of measures promoting professional equality within companies. Accordingly, Article L. 1142-4 of the Labour Code makes explicit provision for positive action in favour of women, although it specifies that such measures must be temporary.[140] They are described as 'measures adopted solely to benefit women with the aim of establishing equal opportunities for women and men, especially by removing existing inequalities which affect women's opportunities', and can take the form of (1) 'regulatory provisions in the areas of recruitment, training, promotion, organisation and working conditions', (2) 'stipulations in extended industry-wide agreements or extended collective agreements', and (3) 'the application of the [so-called] strategy for professional equality for women and men'.[141] The Law of 9 May 2001 promoting professional equality between women and men introduced the requirement to conduct collective negotiations on equality within companies, to produce written reports and to implement appropriate measures.[142] In the different professional sectors, negotiations must now be conducted every three years.

The recent law of 5 September 2018 introduced a requirement for companies with over 50 employees to publish indicators annually on the pay gap between women and men and on the action taken to close the gap.[143] The necessary procedures and a methodology are defined by decree and there is an obligation to conduct negotiations. If the indicators are unsatisfactory, companies must ensure compliance within three years or face penalties. The legal framework thus now allows and even imposes proactive measures. In the public sector, the Law of 12 March 2012 introduced similar measures.[144]

However, no text clearly defines the nature of the measures referred to by the Law of 5 September 2018, Article L. 1142-4 of the Labour Code and the Law of 9 May 2001, which must only respect the general norms and, in particular, those which result from European law.[145] Thus merely intending to establish an advantage for the disadvantaged group is not sufficient. This would be illegal, since it is not a 'measure intended to protect pregnancy or maternity or to promote equal opportunity for men and women by removing existing inequalities which affect women's opportunities', especially in relation to employment.[146]

140 Code du Travail [Labour Code], Art. L 1142-4: The provisions of Articles L. 1142-1 and L. 1142-3 are without prejudice to the introduction of temporary measures adopted solely to benefit women with the aim of establishing equal opportunities for women and men, especially by removing existing inequalities which affect women's opportunities. These measures result from: 1 regulatory provisions established in the areas of recruitment, training, promotion, organisation and working conditions; 2 stipulations in extended industry-wide agreements or extended collective agreements; 3 the application of the strategy for professional equality for women and men.

141 Ibid.

142 Loi relative à l'égalité professionnelle entre les femmes et les hommes, 9 mai 2001, n° 2001-397 [Law on professional equality between women and men, 9 May 2001, n° 2001-397].

143 Loi pour la liberté de choisir son avenir professionnel, 5 septembre 2018, n° 2018-771 [Law on the freedom to choose a professional future, 5 September 2018, n° 2018-771].

144 Loi relative à l'accès à l'emploi titulaire et à l'amélioration des conditions d'emploi des agents contractuels dans la fonction publique, à la lutte contre les discriminations et portant diverses dispositions relatives à la fonction publique, 12 mars 2012, n° 2012-347 [Law on the access to permanent employment and the improvement of the working conditions of contractual agents in the civil service, on combating discrimination and on diverse provisions relating to the civil service, 12 March 2012, n° 2012-347].

145 Ibid.

146 See Cass. Soc., 8 octobre 1996, n° 92-42.291 [Social Chamber of the Court of Cassation, 8 October 1996, n° 92-42.291].

Secondly, the legality of compensation measures is still being debated in relation to pensions. Following the *Griesmar* judgments, the new law approving the use of the increases described above was validated by the French Constitutional Council.[147] After the *Leone* judgment, the Conseil d'Etat approved the French provision *in relation to the past*, supporting its decision with a quantitative analysis of inequalities that penalise women's careers. It did so through a very detailed statement which highlighted the differences between the incomes of women and men and the potential impact the removal of service credits would have for careers which were already completed.[148] Specifically, while noting the divergence from the case law of the European Court, the Conseil d'Etat, according to its Vice President, sought to 'establish the social facts from which the conclusions were to be drawn'.[149]

Thirdly, the debate on access to various branches of the civil service and on quotas has changed completely. As we have seen, on the basis of the Constitution any form of quota was initially prohibited. In 1982, the Constitutional Council declared the law proposing the introduction of quotas for women in municipal elections[150] to be contrary to the Constitution, and this was followed in 2006 by a similar declaration on the law providing for specific proportions of men and women on the boards of directors and supervisory boards of private companies and public sector organisations, on works councils, among employee representatives, on lists of candidates for industrial tribunals and similar civil service bodies.[151] It took two constitutional revisions to clear the blockage. Since the constitutional laws of 8 July 1999 and 23 July 2008, Article 1 of the Constitution no longer states only that France, 'shall ensure the equality of all citizens before the law, without distinction of origin, race or religion' and that '[i]t shall respect all beliefs', but also that the law 'shall promote equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility'. On this basis, it was possible to introduce rules of parity and quotas, both for some political elections (European, regional, departmental and municipal, as well as for some of the seats in the Senate) and for recruitment panels and boards of companies and other bodies.

Nevertheless, resistance remains strong and, as Professor Diane Roman puts it,[152] 'although parity appears to have become a matrix for public policy, in administrative case law it still has the status of an exception which must be established by a legislative text and is strictly interpreted. This approach is readily explained by the administrative court's unfailing adherence to the principle of formal equality which sees parity as a derogation from equality'. The Conseil d'Etat has thus repeatedly condemned measures introduced by lower authorities such as administrative or private regulations, which in contrast to the law voted for in Parliament, cannot derogate from the principle of equality. It has also condemned measures it considers to be too automatic which do not always allow selection panels to exercise freedom of choice or freely undertake an assessment of skills.

The fact that the provision in the Labour Code does not envisage parity, but a measure known as 'proportional diversity, which requires electoral lists for professional elections to reflect the composition of the electoral college, has been the subject of very strong opposition, including in some unions.[153] Recently, it even led to circumvention schemes requiring the intervention of a judge. Thus, to avoid this, some lists just present a single candidate of the under-represented sex.[154]

147 Cons. Constit., 14 août 2003, n° 2003-483 DC, considérant 34 [Constitutional Council, 14 August 2003, no. 2003-483 DC recital 34].
148 CE Ass., 27 mars 2015, *M. Quintanel*, n° 372426 [Council of State Assembly, 27 March 2015, no. 372426].
149 Sauvé, J. M. (2018), 'Allocution introductive du Colloque « la jurisprudence administrative et les femmes »' ['Introductory address at the conference "Administrative jurisprudence and women"], *AJFP*, p. 2212.
150 Cons. Constit., 18 novembre 1982, n° 82-146 DC [Constitutional Council, 18 November 1982, n° 82-146].
151 Cons. Constit., 16 mars 2006, n° 2006-533 DC [Constitutional Council, 16 March 2006, n° 2006-533 DC].
152 Roman, 'The promotion of women through administrative case law'.
153 Code du Travail [Labour Code], Art. L. 2314-30 (former. L. 2314-24-1): *'For each electoral college, the lists mentioned in Article L. 2314-29 which comprise several candidates are composed of a number of women and men corresponding to the proportion of women and men on the electoral roll. The lists are made up by alternating candidates of each sex until there are no more candidates of one of the sexes.'*
154 Cass. Soc., 9 mai 2018, n° 17-14088 [Social Chamber of the Court of Cassation, 9 May 2018, n° 17-14088].

On balance, it can be said at this point that, although the principle of parity has been accepted, it has not been greeted with widespread enthusiasm. Thus it can be concluded that the tradition of formal equality has had to be combined with the need for rules on positive action, but that the struggle is far from over.

Current debates

Without making any claims to be exhaustive, it could be useful to look at some current debates. Regarding the question of whether there is any need for positive action, the principle is still disputed.[155] More specifically, the Vice President of the Conseil d'Etat, Jean Marc Sauvé, summarised the position of the administrative court as follows:[156] 'The promotion of real equality between women and men, particularly through the introduction of measures such as quotas or positive discrimination, is, as we well know, liable to have paradoxical consequences, which must lead us to think about imposing not a limit but a point of equilibrium for any policy of this kind. We must pursue two goals simultaneously: on the one hand, we must seek effective equality and the prohibition of discrimination, and, on the other, we must aim to preserve other principles which are part of the foundations of our social pact, such as equal entry into public employment by ability and without distinction except that of virtues and talents, and also respect for personal and religious freedom'.[157] The issue must therefore be to define the content of this social pact and to establish to what extent, in the name of reality, we hold on to stereotypes. When statistics reveal a situation of inequality, how can we make the distinction between the stereotype which must be challenged and the social reality with which we are dealing?

Furthermore, is it a question of ensuring equality for the individual beneficiaries or for the status of women in general and their image in society? Here we return to the debate which began in 1988 about diversity in teaching bodies. In terms of the suitability of the measure and specifically the avoidance of stereotypes, how should 'positive' be defined? It is not enough, we know, to assert that the action is positive, it must be shown that it leads to equality. This is an eminently political issue.

A recent judgment from the Court of Cassation provides an example of this ambiguity.[158] A collective agreement gave a half-day holiday to female employees to mark International Women's Day on 8 March. This was clearly discrimination on the ground of sex. When a male employee asked to be entitled to the same benefit, the Court of Cassation adjudicated. Despite clearly contrary advice from its advocate general, it considered that this measure could be approved as positive discrimination. For the Court, 'by applying Articles L. 1142-4, L. 1143-1 and L. 1143-2 of the Labour Code,[159] interpreted in the light of Article 157, paragraph 4, of the Treaty on the Functioning of the European Union, a collective agreement may include a half-day holiday only for female employees on the occasion of International Women's Day, since this measure aims to establish equal opportunities for men and women by removing existing inequalities which affect opportunities for women'. The commentary on the judgment on the Court's website explains that, '[e]vents of any kind on 8 March provide an opportunity for reflection on the particular situation of women at work and ways in which it may be improved. The Social Chamber considers that there is therefore a link between this day and working conditions which legitimises this measure established by a collective agreement to promote equal opportunities.'[160]

155 On 11 September 2011, during a radio broadcast, the Minister for European Affairs said that positive discrimination is 'completely contrary to the interests of women. *If you are a woman who is appointed because you're a woman, that will follow you throughout your life, throughout your career. That's not how I want things to be'*. Slate.fr, 'Pour la ministre Nathalie Loiseau, imposer une femme à l'Assemblée est 'contraire aux intérêts des femmes" 11 September 2018, available at http://www.slate.fr/story/167093/pour-la-ministre-nathalie-loiseau-la-discrimination-positive-est-contraire-aux-interets accessed on 20 September 2018.

156 Sauvé, 'Allocution introductive du Colloque "La jurisprudence administrative et les femmes"', p. 2212.

157 Ibid.

158 Cass. Soc., 12 juillet 2017, n° 15-26 262 [Social Chamber of the Court of Cassation, 12 July 2017, n° 15-26 262].

159 Articles on positive action and the possibility of implementing them through collective negotiation.

160 Cour de Cassation, 'Explanatory note on Cass. Soc., 12 juillet 2017, n° 15-26 262' available at https://www.courdecassation.fr/jurisprudence_2/notes_explicatives_7002/droits_femmes_37306.html accessed on 20 September 2018.

This analysis has been strongly criticised. As noted by Professor Jérôme Porta, '[t]he judgment of 12 July 2017 undeniably marks a significant change. The benefit in question – the half-day holiday to which only female employees are entitled – has no link to protection of pregnancy or maternity or to the promotion of female employees in the company (where there was no suggestion that they were under-represented) or to a disadvantage specifically identified as one from which women within the company suffered. The solution is therefore technically questionable and it is no less dubious in terms of its symbolic value. Taking women away from the workplace, even by granting them a holiday, brings to mind a certain differentialist philosophy which long had the effect of excluding women from work, in the name of protecting them'.[161] Would it be acceptable for positive action to encourage the campaign for women's rights to be restricted to women? Whether this decision is in compliance with the legal principles of the Union is more than debatable.

V Conclusion

Are further conclusions necessary? The example given above shows that by not clarifying the concepts it is possible, under the guise of positive action, for the very purpose of and thereby our progress towards equality, to be called into question. An overstretched definition of positive action risks diluting its effects and leading to its purpose – equality – being forgotten. At the same time, a too restrictive definition risks leading to the inefficiency of positive action and the perpetuation of existing inequalities.

For the concept of positive action to be useful, it is essential to have a definition of the positive which does not perpetuate stereotypes. This would prevent the recurrence of those special advantages which only serve to uphold differences for which there is no objective basis. Ultimately, positive action is not compensation but a measure aimed at the future. The question is how to ensure that measures are 'devised' in order to start building equality instead of being compensatory. Shouldn't positive action be restricted to this strategy and achieved by envisaging the establishment of rights which are consistent with this approach? On this point, clarifications are necessary, even essential, if positive action is not to lose its positive role. The resistance found in some countries to the concept, for a variety of reasons, would surely be reduced if a clearer definition were to be given, establishing that it is not about static compensation or underpinning stereotypes, but about favouring a real level-playing field in order to make significant progress towards equality. Positive action is, after all, action and can therefore only be forward-looking. If equality had been achieved, it would be unnecessary. But it has not and so we need imagination… and diligence. We shall continue our work on this task – equality is an ongoing project. Despite alternating between setbacks and advances, we shall remain resolutely optimistic.

161 Porta, J. (2018) 'Droit et genre, RÉGINE', *Recueil Dalloz*, no. 17/7774, p. 919.

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